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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Mike Uhlmann
Frank Seidl

SPECIAL

Take necessary action	☐
Approval or signature	☐
Comment	☐
Prepare reply	☐
Discuss with me	☐
For your information	☐
See remarks below	☐

FROM Bob Carlstrom DATE 6-17

REMARKS

Justice testimony on HR 5679 re death penalty (Lowell Jensen)

Testimony is to be given on Thursday, June 24. Please comment by noon, Monday, June 21.

Thanks

OMB FORM 4
REV AUG 70

Draft testimony for June 24 - hearing before House Subcommittee on Criminal Justice by AAG Lowell Jensen, Criminal Division.

JUN 8 1982

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to present the views of the Department of Justice on that portion of H.R. 5679, the criminal code reform bill introduced by Representative Sensenbrenner, which provides for the imposition of the sentence of death for federal offenses of murder, treason, espionage, and air piracy.

In my testimony today, I would like to present the Department's views on the substance of the death penalty provisions of H.R. 5679 and comment briefly on the issue of their inclusion in criminal code reform legislation.

As you know, Mr. Chairman, federal statutes currently provide for the death penalty for treason, murder, espionage, rape, air piracy, and certain other felonies where a death results from their commission. However, except for the air piracy statute -- the most recent federal death penalty enacted in 1973 -- the existing death penalty provisions of federal law are all unenforceable in view of a series of Supreme Court decisions beginning in 1972 with Furman v. Georgia, 408 U.S. 238, because they fail to set forth legislated guidelines to control the exercise of the fact-finder's discretion in determining whether the death penalty should be imposed.

Both the President and the Attorney General have repeatedly indicated in public statements that they support the imposition of the death penalty in carefully circumscribed conditions for the most serious crimes. In our view, the death penalty is warranted for two principal reasons.

DRAFT

First, while sociological studies have reached differing conclusions, common sense tells us that the death penalty does operate as an effective deterrent for some crimes involving premeditation and calculation, and that it thus will save the lives of persons who would otherwise become the permanent and irretrievable victims of crime.

Second, society does have a right -- and the Supreme Court has confirmed that right -- to exact a just and proportionate punishment on those who deliberately flout its laws; and there are some offenses which are so harmful and so reprehensible that no other penalty, not even life imprisonment without the possibility of parole, would represent an adequate response to the defendant's conduct.

For these reasons, this Administration strongly supports reinstatement of the death penalty as an available sanction for the most grave federal crimes. We note that the people of the United States clearly favor the availability and imposition of the death penalty in certain cases. National public opinion polls consistently show a large majority of the American public in support of death penalty laws. In the years since the Furman decision, no fewer than 35 of the 50 State legislatures have enacted death penalty provisions designed to meet the requisites announced by the Supreme Court; the effort to enact such laws, moreover, continues in other States.

In our view, H.R. 5679's procedures for the imposition of the death penalty, with one exception, appear to satisfy the constitutional requirements articulated by the Supreme Court. Consistent with the Court's death penalty decisions, chapter 38 of the bill sets forth specific aggravating and mitigating factors which are to guide the jury (or judge) in determining whether, under the particular circumstances of a case, the death penalty is warranted. In addition to the enumerated mitigating factors, the bill permits the consideration of any other mitigating circumstance, an element of flexibility required under the Supreme Court's decision in Lockett v. Ohió, 438 U.S. 586 (1978).

The bill's procedures for sentencing in capital cases (but not, as will be discussed later, its substantive scope) are virtually identical to those contained in S. 114, the death penalty bill reported by the Senate Judiciary Committee in July of last year. I testified on behalf of the Department in support of S. 114, and we submitted a detailed commentary on the bill as introduced which suggested a number of amendments, all of which were adopted by the Committee. This commentary appears in the published hearings on S. 114.

Presently, the only aspect of the procedural provisions of S. 114, and thus of the analogous provisions of H.R. 5679, about which we have strong reservations is an amendment adopted by the Senate Judiciary Committee and retained in H.R. 5679 that appears to require jury unanimity only as to the existence of some aggravating factor, not as to the existence of a particular aggravating factor. Thus, under the bill, it would be possible to find an aggravating factor and impose the death penalty even if less than all the jurors, or only a minority of jurors, agreed as to the existence of any particular aggravating circumstance. We believe on both legal and policy grounds that any aggravating factor that is to be the basis for imposition of the death penalty should be supported by a unanimous finding. Such unanimity will assure that the death penalty is not imposed arbitrarily, and would not, in our view, serve as a procedural barrier to the imposition of the death penalty in appropriate cases.

A second aspect of the death penalty provisions of H.R. 5679 that we view as problematic relates to their substantive scope -- specifically the kinds of murder offenses for which the death penalty could be imposed. Section 3801 of the bill permits the imposition of the death penalty for a Class A felony violation of the murder offense, which is set out in section 2301. Because of the way in which section 2301 is drafted, however, the application of the death penalty for homicide offenses is too broad in one respect and too limited in another.

Our concerns about an overly broad application of the death penalty arise from the fact that attempted murder is punishable as a Class A felony under section 2301. Thus, by virtue of the phrasing of the bill's death penalty provisions, all attempted murders would be punishable as capital offenses.

I suspect that this result may not have been intended, and indeed, it is likely that the required aggravating factors for homicide offenses would operate to preclude imposition of the death penalty for an attempted murder. 1/

The overly restrictive application of the death penalty for homicides arises from section 2301's limitations on the instances in which a homicide committed in the course of a felony is punishable as a Class A felony. First, although the offense of felony-murder under section 2301 is drafted so as to retain the principle that a felon may be held responsible for a homicide committed by one of his confederates, the killer's requisite state of mind is the same as that which would otherwise be required for his conviction of first degree murder. This is too stringent a limitation on a defendant's liability under the felony-murder doctrine. Second, this liability is triggered only in the case of four underlying offenses: rape, arson, burglary, and robbery. We strongly urge the expansion of this list of underlying felonies to include other offenses such as kidnapping, escape, treason, sabotage, aircraft hijacking and espionage, which also entail, by their very nature, a considerable risk of physical violence. 2/ Third, section 2301

1/ The one instance in which the death penalty might not be a disproportionate punishment for an attempted murder would be in the case of a particularly serious attempt on the life of the President. S. 114 would permit the death penalty in such circumstances.

2/The Department recommends that the same offenses which serve as the basis for felony-murder liability in section 1601 of the Senate criminal code reform bill, S. 1630, be included in the analogous provision of section 2301 of H.R. 5679.

fails to provide for federal jurisdiction over the homicide in a felony-murder based on the federal nature of the underlying offense. Thus, for example, if a teller were killed during the course of a robbery of a federal insured bank, there would be jurisdiction over the robbery, but not over the homicide.

The Department recommends that these three limiting aspects of section 2301 be amended so that aggravated homicides committed in the course of particularly dangerous federal felonies can be appropriately punhat aggravated homicides committed in the course of particularly dangerous federal felonies can be appropriately punished. With these and the two other changes I mentioned earlier, the death penalty provisions of H.R. 5679 would provide a sound merchamism for the reinstatement of the availability of the death penalty as an appropriate sanction to effectively deter and justly punish the most serious federal crimes. This result is one which the Department strongly endorses.

In spite of our firm support for the reinstatement of the death penalty, the Department has had serious concerns about the advisability of including death penalty provisions in criminal code reform legislation. Passage of a modern, rational, and comprehensive federal criminal code, a code that will not only clarify and simplify current law but also work long overdue substantive improvements in law enforcement, is a goal to which this Administation is committed. Thus, as the Attorney General stressed in testimony before this Subcommittee last year, the

Department has recommended against inclusion of highly controversial issues which would jeopardize the passage of criminal code reform legislation.

Traditionally, the death penalty has been an issue which generated considerable controversy. However, it may be that there is a growing consensus in the Congress, reflecting the consensus among the States, that the death penalty should be restored as a permissible punishment for the most reprehensible federal crimes. If such a consensus does exist and inclusion of the death penalty would not generate such controversy as to impede action on criminal code reform legislation, the Department would have no objection to the inclusion of death penalty provisions such as those in H.R. 5679, amended as I have suggested, in a criminal code reform bill.

Mr. Chairman, that concludes my prepared statement, and I would be pleased at this time to answer any questions that you or other members of the Subcommittee may have.

commit a dangerous criminal who has been found not guilty only by reason of insanity. They use the same standard for post-trial committal of a violent criminal as would apply in a civil commitment proceeding for a harmless grandmother.

The Bill would require the prosecutor to prove by "clear and convincing evidence" that the person is a danger to society.

It would make sense to amend the Bill to create a presumption that anyone who has committed or attempted a violent crime, and has been found not guilty only because of insanity, poses a substantial risk of injury to others if released.

IV. Recommendations

1. Prepare Presidential transmittal letter. (Already in process).

2. If it appears that the Senate will be in session next week:

   - Send Bill up by Friday with Presidential transmittal letter.

   - Still make radio speech on August 28 on Crime and Administration's initiatives.

3. If it appears that the Senate will go into recess:

   - Make sure Senator Baker gets unanimous consent agreement that Bills can be received during recess.

   - Send Bill up on August 28 with Presidential transmittal letter.

   - Make radio speech on August 28 on Crime and Administratiion's initiatives.

   - In interim, discuss above-mentioned suggested improvement with Justice.

THE WHITE HOUSE
WASHINGTON

August 23, 1982

TO: MARSHALL CAIN

FROM: BILL BARR WPB

Attached is the prefatory material for the new crime package. Would you please run off another copy of the bill with this at the front end.

Otherwise, we see no other changes that have to be made.

Please red tag the new printout back to me as soon as it is ready.

Thank you very much.

A BILL

To reform the use of the insanity defense in federal criminal cases, to ensure the admissability of evidence when obtained by law enforcement authorities acting in good faith, and to define circumstances justifying federal intervention in state criminal proceedings.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That this Act may be cited as the "Criminal Justice Reform Act of 1982."

Crime

Memo to file, from SHG, re. 8/17/82 memo to Meese & Harper

Analysis

Weaknesses and suggested improvements in crime package:

Insanity defense

Sec. 4243 (d) establishes a very heavy burden for the prosecution to commit a defendant who has been found not guilty only by reason of insanity. By requiring clear and convincing evidence that the defendant poses a danger to society, the section sets the same standard as applies to civil commitment of a person who has never committed a crime. Such a standard is very difficult for a prosecutor to meet, given the vagaries of psychiatric testimony.

For a person who has already committed or attempted a violent act against someone, the standard should not be nearly so high. When a person is adjudged "not guilty only by reason of insanity", the jury has concluded beyond a reasonable doubt that the person has committed the criminal act of which he is accused.

If the defendant has done or attempted bodily injury to a person, then it is logical to presume a substantial risk that he will do bodily injury to others if released. If he has done or attempted serious damage to the property of a person, then it is logical to presume that his release would risk damage to property of others.

The reasoning is clear: if the defendant was capable of injuring people or seriously damaging property without even having a specific intent ("mens rea"), then he could just as well perform or attempt similar crimes against others. Unless his mental state has changed, his danger to society remains the same. Therefore, it is reasonable to presume a substantial risk to society from the established fact of the defendant's past conduct.

By adding such a presumption to the bill, we would make the burden on prosecutors far more reasonable. A defendant could reubt the presumption by showing that he is no longer insane or that his mental state has changed in such a way as to make him no longer a danger to society.

Alternative suggestion: It would also be possible to lower the standard from a clear and convincing evidence to a mere preponderance of the evidence. But this change would raise possible constitutional problems. The Supreme Court will consider next Term whether the District of Columbia may use a mere preponderance test for civil commitment of the criminally insane (Jones case on cert. from D.C. Ct. of Appeals), but the Court has ruled in the past that civil commitment of innocent persons must be based on clear and convincing evidence.

Habeas Corpus

Sec. 302 (d) III of the Crime package prevents a convict from raising a habeas claim if he failed to raise the claim properly in State proceedings. The section allows three exceptions to this rule.

1. when failure to raise claim resulted from unconstitutional State action;

2. when the Federal right asserted in the claim was newly recognized by the Supreme Court; or

3. when the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

Exception III is an unnecessary infringement upon State authority and should be deleted.

The proper avenue of redress when a convicted defendant dsiscovers a new "factual predicate" foer a claim or defense is to make a motion uin the State trial court to reopen the case or hold a new trial on grounds of new evidence. In fact, Federal judges who receive claims pursuant to Section III may very well send the petitioner off to State court to exhaust his State remedies before filing a habeas petition.

State remedies will occasionally not be available, however, when the State has made certain policy decisions, e.g., that trials should not be reopened after a certain time has elapsed, or that certain new "factual predicates" are not relevant to the defendant's guilt or innocence.

The question is: when a state has made such a policy decision, should the Federal government override by making habeas relief available? There is no persuasive reason to overrtide unless the State's policy decision is contrary to the U.S. Constitution. Such cases are already provided for by Exception I.

Recommendation:

Eliminate Exception III and allow the states to decide the terms and circumstances under which new evidence should be considered. Direct review and habeas will still be available under the usual procedures for Federal courts to review whether the States deal with claims of new evidence in a constitutionally adequate manner.

File - Crime

TITLE I -- OFFENDERS WITH MENTAL DISEASE OR DEFECT

Sec. 101. This title may be cited as the "Insanity Defense Reform Act of 1982."

Sec. 102. (a) Chapter 313 of title 18, United States Code, is amended to read as follows:

"CHAPTER 313 -- OFFENDERS WITH MENTAL DISEASE OF DEFECT

"Sec.

"4241. Determination of Mental Competency to Stand Trial.

"4242. Determination of the Existence of Insanity at the Time of the Offense.

"4243. Hospitalization of a Person Acquitted by Reason of Insanity.

"4244. Hospitalization of a Convicted Person Suffering from Mental Disease or Defect.

"4245. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect.

"4246. Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect.

"4247. General Provisions for Chapter.

"§4241. Determination of Mental Competency to Stand Trial

p.6 - clear + convincing?

p.14 - does this accord w/ procedures for involuntary commitment?

p.27 - habeas

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.--Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

"(c) HEARING.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility --

"(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time until--

"(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

"(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

"(e) DISCHARGE.--When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, "(b) MOTION FOR PRETRIAL PSYCHIATRIC OR PSYHOLOGICAL EXAMINATION .--Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, that the defendant intends to rely on the defense set forth in subsection (a), the court, upon motion of the attorney for the government, may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

"(c) SPECIAL VERDICT.--If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a nonjury trial, the court shall find, the defendant--

"(1) guilty;

"(2) not guilty;

"(3) not guilty only by reason of insanity.

"§4243. Hospitalization of a Person Acquitted by Reason of Insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON .--If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release pursuant to subsection (d).

he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.--A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§4242. Determination of the Existence of Insanity at the Time of the Offense

"(a) INSANITY DEFENSE.--It is a defense to a prosecution under any Federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.--Prior to the date of the hearing, pursuant to subsection (c), the court shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

"(c) HEARING.--A hearing shall be conducted pursuant to the provisions of section 4247(d) and shall take place not later than forty days following the special verdict.

"(d) DETERMINATION AND DISPOSITION.--If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility until--

tell con Pauley

~~Clear~~ unclear

Addison v. Texas civil commitment standard is clear & conv.

const'ly comp

pending before Supt.

Jones case D.C. Ct. App.

we argue preponderance is const'ly permissible

voids a const'l cloud on the bill

Ulster County S.Ct. couple years ago

sum. Leary maximizes Todd Gainey

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.--When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from this mental disease or defect to such an extent that--

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another,the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall--

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

"(f) REVOCATION OF CONDITIONAL DISCHARGE.--The director of a medical facility responsible for administering a regimen imposed on an acquitted person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"§4244. Hospitalization of a Convicted Person Suffering From Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.--A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.-- Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c). In addition to the information required to be included in the psychiatric or psychological report pursuant to he provisions of section 4247(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to require his custody for care or treatment in a suitable facility, the report shall also include an opinion by the examiner concerning the sentencing alternatives that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.-- The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION. -- If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

"(e) DISCHARGE -- When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

"§4245. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT. -- If a defendant serving a sentence of imprisonment objects either in writing or through his attorney to being transferred to a suitable facility for care or treatment, an attorney for the government, at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.-- Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant may be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

"(c) HEARING -- The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION. -- If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility until he is no longer in need of such custody for care or treatment or until the expiration of his sentence of imprisonment, whichever occurs earlier.

"(e) DISCHARGE. -- When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the term of imprisonment imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned until the expiration of his sentence of imprisonment.

"§4246. Hospitalization of a person due for release but suffering from mental disease or defect "(a) INSTITUTION OF PROCEEDING -- If the director of a facility in which a person is hospitalized certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to he mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT -- Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

"(c) HEARING.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

"(d) DETERMINATION AND DISPOSITION.--If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until--

"(1) such a State will assume such responsibility; or

"(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

"(e) DISCHARGE.--When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that--

"(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

"(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall--

"(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

"(B) order, as a explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment

"(f) REVOCATION OF CONDITIONAL DISCHARGE.--The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the presribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

"(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.--If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

"§4247. General Provisions for Chapter--

"(a) DEFINITIONS. --As used in this chapter--

"(1) 'rehabilitation program' includes--

"(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

"(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

"(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

"(D) organized physical sports and recreation programs; and

"(2) 'suitable facility' means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant.

"(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.--A psychiatric or psychological examination ordered pursuant to this title shall be conducted by a licensed or certified psychiatrist or clinical psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, or 4246, for a resonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

"(c) PSYCHIATRIC OR PSYCHOLOGICAL REPORTS.--A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include--

"(1) the person's history and present symptoms;

"(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

"(3) the examiner's findings; and

"(4) the examiner's opinions as to diagnosis, prognosis, and--

"(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

"(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

"(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

"(d) HEARING.--At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.--(1) The director of the facility in which a person is hospitalized pursuant to--

"(A) section 4241 shall prepare semiannual reports; or

"(B) sections 4243, 4244, 4245, or 4246 shall prepare annual reports; concerning the mental condition of the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(2) The director of the facility in which a person is hospitalized pursuant to sections 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are available for persons hospitalized in that facility.

"(f) VIDEOTAPE RECORD.--Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

"(g) ADMISSIBILITY OF A DEFENDANT'S STATEMENT AT TRIAL.-- A statement made by the defendant during the course of a psychiatric or psychological examination pursuant to sections 4241 or 4242 is not admissible as evidence against the accused on the issue of guilt or punishment in any criminal proceeding, unless the defendant waived his privilege against self incrimination, but is admissible on the issue whether the defendant suffers from a mental disease or defect.

"(h) HABEAS CORPUS UNIMPAIRED.-- Nothing contained in sections 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

"(i) DISCHARGE.--Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of sections 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the government.

"(j) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL--. The Attorney General --

"(A) may a contract with a State, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

"(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

"(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

"(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

"(k) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.".

(b) The item relating to chapter 313 in the chapter analysis of Part III of title 18, United States Code, is amended to read as follows:

"313. Offenders with mental disease or defect.".

SEC. 103. Rule 12.2 of the Federal Rules of Criminal Procedure is amended--

(a) by deleting "crime" in subdivision (a) and inserting in lieu there of "offense";

(b) by deleting "mental state" in subdivision (b) and inserting in lieu thereof "state of mind";

(c) by deleting "by a psychiatrist designated for this purpose in the order of the court" in subdivision (c) and inserting in lieu thereof "pursuant to 18 U.S.C. 4242"; and

(d) by deleting "mental state" in subdivision (d) and inserting in lieu thereof "state of mind".

SEC. 104.

Section 3006A of title 18, United States Code, is amended--

(a) in subsection (a), by deleting "or, (4)" and substituting "(4) whose mental condition is the subject of a hearing pursuant to chapter 313 of this title, or (5)"; and

(b) in subsection (g), by deleting "or section 4245 of title 18".

APPLICATION

TITLE II -- ~~LIMITATION~~ OF THE EXCLUSIONARY RULE

Sec. 201. This title may be cited as the "Exclusionary Rule Application ~~Limitation~~ Act of 1982."

Sec. 202. (a) Chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§3505. Application ~~Limitation~~ of the Fourth Amendment Exclusionary Rule

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.".

(b) The table of sections of such chapter is amended by adding at the end thereof the following item:

"3505. ~~Limitation~~ Application of the Fourth Amendment Exclusionary Rule.".

Federal Intervention in State Criminal Proceedings

TITLE III -- ~~HABEAS CORPUS~~

Sec. 301. This title may be cited as the "~~Habeas Corpus~~ Federal Intervention Reform Act of 1982."

Sec. 302. Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) When a person in custody pursuant to the judgement of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and --

"(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

"(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default,

David Karp - OLP- Rose or Rice 633-3273

~~Why not use~~ Isn't this the same standard as for "new evidence"?

Not alw

Rule 35 - two-year limit for newly-discovered evidence "(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

"(1) the time at which State remedies are exhausted;

"(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

"(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

SEC. 303. Section 2253 of title 28, United States Code, is amended to read as follows:

"§2253. Appeal

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.".

Sec. 304. Federal Rule of Appellate Procedure 22 is amended to read as follows:

"Rule 22.

"HABEAS CORPUS AND §2255 PROCEEDINGS

"(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

"(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to 28 U.S.C. §2255, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.".

Sec. 305. Section 2254 of title 28, United States Code, is amended by redesignating subsections "(e)" and "(f)" as subsections "(f)" and "(g)" respectively, and is further amended --

(a) by amending subsection (b) to read as follows:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.";

(b) by adding a new subsection (d) reading as follows:

"(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings."; and

(c) by redesignating subsection "(d)" as subsection "(e)", and amending it to read as follows:

"(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence.".

Sec. 306. Section 2255 of title 28, United States Code, is amended by deleting the second paragraph and the penultimate paragraph thereof, and by adding at the end thereof the following new paragraphs:

"When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and --

"(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

"(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

"(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

"A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

"(1) the time at which the judgment of conviction becomes final;

"(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

"(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

"(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.".

THE WHITE HOUSE
WASHINGTON

August 27, 1982

MEMO

MIKE: Dave Swanson called from Legislative Affairs to see if we want them to take action to arrange for receipt of the New Crime Package on September 4 while Congress is in recess. He said he is not sure that this could be done, since Congress recessed without any unanimous consent agreement to this effect.

Swanson mentioned that we could have the President say in his September 4th radio address that he is "sending the bill up today," and the Senate would simply receive the bill when it returns on the 8th. Alternatively, the President could say he is sending the bill up on the 8th.

What should we do from here?

Steve

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Mike Uhlmann	Take necessary action ☐
✓ Bill Barr	Approval or signature ☐
Frank Seidl	Comment ☐
Adrian Curtis	Prepare reply ☐
	Discuss with me ☐
	For your information ☐
	See remarks below ☐

FROM Greg Jones Greg

DATE 8/31/82

REMARKS

Attached, FYI, is a Justice Department letter to OMB re: Administration opposition to H.R. 4481 and S. 2411.

Please note Justice's comment concerning a possible veto of either bill.

cc: Bill Maxwell

OMB FORM 4
REV AUG 70

U.S. Department of Justice
Office of Legislative Affairs

E 6-8/81.2

Jones

Office of the Assistant Attorney General

Washington, D.C. 20530

AUG 31 1982

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

In tracking major legislative proposals affecting this Department, we feel it is incumbent upon us to note the progress of S. 2411 and H.R. 4481. These bills, attempting to amend the Omnibus Crime Control and Safe Streets Act of 1968, are strongly opposed by this Administration. Specifically, these bills relate to the activities of the Justice Systems Improvement Act agencies (referring to the Office of Justice Assistance, Research and Statistics (OJARS), National Institute of Justice (NIJ), and Bureau of Justice Statistics (BJS)).

Congressman Hughes introduced H.R. 4481 on September 15, 1981. An amended version passed in the House on February 10, 1982, by a 289-73 vote. This measure is now awaiting Senate action.

The Senate bill S. 2411, introduced by Senator Specter, seems to be moving despite the Administration's objections. S. 2411 is a priority item on the agenda for the next Senate Judiciary Committee meeting. It appears that approximately 14 solid votes are committed to reporting this bill out of full committee, including Chairman Thurmond.

With strong bipartisan support for this legislation in both chambers of Congress, funding for this type of legislation would appear to be imminent. Unless there is an, as yet, unveiled strategy to kill this legislation, it would appear to be in the best interest of the Administration to modify the adamant position taken thus far in opposing this legislation. Otherwise, we will continue to be precluded from having a meaningful role in shaping its provisions.

We would propose to communicate with the cognizant Members and staff in an attempt to alter the more objectionable fiscal and structural features of this legislation. Time is of the essence if we are to retain any influence and credibility in the processing of this legislation.

We would appreciate "clearance" to negotiate this matter. If a veto is contemplated we would appreciate the opportunity to discuss the ramifications given the Congressional popularity of this legislation.

Sincerely,

C. Wardell Cain

for Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

cc: Kenneth M. Duberstein
Assistant to the President
for Legislative Affairs

THE WHITE HOUSE
WASHINGTON

TRICIA:

IN READING OVER THIS MEMO, I DISCOVERED THAT ON THE SECOND PAGE I HAD TYPED "BE" INSTEAD OF "BY". I AM SENDING YOU THE CORRECTED VERSION FOR YOUR FILES. SPEAKING OF FILES, LET"S TALK WHEN WE CAN ABOUT A JOING FILING SYSTEM.

SGP

Insert on p. 6 of Crime Package:

The existence of clear and convincing evidence shall be presumed where a person has been found not guilty only by reason of insanity of an offense involving a substantial risk of bodily injury to another person or serious damage to property of another. The acquitted person shall have the burden of rebutting this presumption by a preponderance of the evidence.

Insert on p. 6 of Crime Package:

The existence of clear and convincing evidence shall be presumed where a person has been found not guilty only by reason of insanity of an offense involving a substantial risk of bodily injury to another person or serious damage to property of another. The acquitted person shall have the burden of rebutting this presumption by a preponderance of the evidence.